David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1–21–72 OF 2003

HARMINDAR SINGH JC

8 APRIL 2009

Public Authorities — Tort — Breach of statutory duty — Accident caused by monorail train on test run — Action against railway authority for breach of duty under the Railways Act 1991 — Whether private law cause of action arose — Whether Parliament intended to confer private right of action under the Railways Act 1991

Tort — Negligence — Res ipsa loquitor — Safety wheel of monorail train fell off and hit plaintiff standing below — Plaintiff unable to show how wheel had come off — Whether doctrine of res ipsa loquitor applicable — Whether prima facie case of negligence made out

The plaintiff was standing at a road divider directly below an elevated KL Monorail track when a safety wheel weighing 13.4kg from a KL Monorail train which was passing overhead on a test run came off and fell on the plaintiff. He suffered serious head and bodily injuries as a result. The plaintiff alleged negligence on the part of the defendants and claimed for general and special damages. The first defendant was the designer and manufacturer of the KL Monorail train. The second defendant was responsible for the installation, commission and operation. The fourth defendant is the approving and certifying authority under the Ministry of Transport of any railway scheme in Malaysia. The primary issue in this case was whether the incident was caused by the want of care or negligence of the defendants in the operation of the train as it was passing above the plaintiff at the relevant time. The plaintiff alleged that there was a design defect and that the test run of the train was undertaken without ensuring that the train was ready and safe to be used over a public pathway and pedestrian area. He also claimed breach of the statutory duties by the fourth defendant. The defendants argued that there was no evidence of any weakness in the design and that tampering by unknown persons could be the reason for the wheel falling off.

Held, dismissing the plaintiff's claim against the fourth defendant with costs:

(1) Applying the principles of the maxim of res ipsa loquitur, it would be safe to assert that a safety wheel of a Monorail train does not, in the ordinary course of things, fall off and hit persons on the ground below. The safety wheel on the train was under the sole control of the first and second defendants or their servants. Although the plaintiff could point to the safety wheel coming off the Monorail train, he was unable to state precisely why the wheel had come off. The plaintiff had made out a prima facie case of negligence on the part of the first and second defendants. It was therefore incumbent on the part of the first and second defendants to provide credible evidence to show that the incident occurred without negligence (see para 24).

(2) It was not sufficient to show several hypothetical causes consistent with the absence of negligence and that the accident might have occurred without negligence on their part. To discharge the onus they had to go further and either show that they had not been negligent, or give an explanation of the cause of the accident which did not connote negligence by them (see para 26).

(3) The first and second defendants had failed to provide a reasonable explanation as to how the safety wheel had come off the train. They only alluded to a possibility that there had been tampering by unknown persons. However, no evidence of tampering was disclosed. The first and second defendants had fallen far short of discharging the onus. Negligence had been proven on the part of the first and second defendants. They were therefore liable to the plaintiff equally for damages and costs (see paras 27 & 30).

(4) The fourth defendant was responsible to perform its statutory duties with regards to the Monorail trains even though there was no license yet and the train was only on a test run when the incident occurred. Railway operations would include test runs prior to a license being issued (see para 32).

(5) A private law cause of action only arises if it could be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. Section 4 of the Railways Act 1991 in no way confers any such right of private action by a member of the public injured by a breach. On this ground alone, the action against the fourth defendant should be dismissed. Anyhow, there was no breach of statutory duty (see paras 35–36).

[Bahasa Malaysia summary

Plaintif sedang berdiri di pembahagi jalan di bawah landasan bertingkat Monorel KL apabila sebuah tayar keselamatan seberat 13.4kg daripada sebuah kereta api Monorel KL yang sedang melintas di atas untuk ujian permulaan telah tercabut dan jatuh ke atas plaintif. Akibat itu, dia telah mengalami kecederaan kepala dan badan yang serius. Plaintif mendakwa berlaku kecuaian di pihak defendan-defendan dan menuntut ganti rugi am dan khas. Defendan pertama merupakan pereka dan pembuat kereta api Monorel KL. Defendan kedua bertanggungjawab untuk pemasangan, pelengkapan dan operasi. Defendan keempat merupakan pihak berkuasa yang memberikan kelulusan dan pengesahan di bawah Kementerian Pengangkutan untuk mana-mana skim landasan kereta api di Malaysia. Isu utama dalam kes ini adalah sama ada kejadian itu disebabkan oleh sikap tidak cermat atau kecuaian defendan-defendan dalam mengendalikan kereta api itu semasa ia melintas di atas plaintif pada masa berkaitan. Plaintif mendakwa terdapat kecacatan pada rekaan dan ujian permulaan kereta api itu telah dilakukan tanpa memastikan bahawa kereta api itu sedia dan selamat untuk digunakan atas laluan awam dan kawasan pejalan kaki. Dia juga mendakwa berlaku pelanggaran kewajipan statutori oleh defendan keempat. Defendan-defendan berhujah bahawa tiada keterangan tentang apa-apa kelemahan dalam rekaan dan mungkin tayar itu terjatuh sebab telah dibega oleh orang yang tidak diketahui.

Diputuskan, menolak tuntutan plaintif terhadap defendan keempat dengan kos:

(1) Dengan mengguna pakai prinsip-prinsip maxim res ipsa loquitur, boleh ditegaskan bahawa sebuah tayar keselamatan kereta api Monorel tidak akan, dalam keadaan biasa, terjatuh dan terkena orang di bawah. Tayar keselamatan pada kereta api itu di bawah kawalan mutlak defendan-defendan pertama dan kedua atau pekerjanya. Meskipun plaintif dapat menjelaskan tentang tayar keselamatan yang telah tercabut daripada kereta api Monorel itu, tetapi dia tidak dapat menyatakan dengan tepat kenapa tayar itu tercabut. Plaintif berjaya membuktikan kes prima facie kecuaian di pihak defendan-defendan pertama dan kedua. Oleh itu adalah wajar di pihak defendan-defendan pertama dan kedua untuk mengemukakan keterangan yang kukuh bagi menunjukkan bahawa kejadian itu telah berlaku tanpa kecuaian (lihat perenggan 24).

(2) Ia tidak mencukupi untuk menunjukkan sebab-sebab hipotetikal yang konsisten dengan ketiadaan kecuaian dan bahawa kemalangan itu mungkin berlaku tanpa kecuaian di pihak mereka. Untuk melepaskan

beban pembuktian, mereka perlu lebih daripada itu dan sama ada menunjukkan bahawa mereka tidak berlaku cuai, atau memberikan penjelasan tentang sebab kemalangan itu yang tidak membawa konotasi bahawa mereka telah cuai (lihat perenggan 26).

(3) Defendan pertama dan kedua telah gagal untuk mengemukakan penjelasan munasabah tentang bagaimana tayar keselamatan itu tercabut daripada kereta api itu. Mereka hanya secara tak langsung menyebut terdapat kemungkinan bahawa orang yang tidak diketahui telah membega tayar itu. Defendan pertama dan kedua telah gagal untuk melepaskan beban pembuktian mereka. Kecuaian telah dibuktikan di pihak defendan pertama dan kedua. Mereka dengan itu bertanggungjawab terhadap plaintif untuk ganti rugi dan juga kos (lihat perenggan 27 & 30).

(4) Defendan keempat bertanggungjawab untuk melaksanakan kewajipan statutorinya berkaitan kereta api-kereta api Monorel meskipun tiada lesen lagi dan kereta api itu hanya untuk ujian permulaan apabila kejadian itu berlaku. Operasi landasan kereta api termasuklah ujian permulaan sebelum lesen dikeluarkan (lihat perenggan 32).

(5) Kausa tindakan undang-undang persendirian hanya timbul jika ia dapat dibuktikan, dalam perkara pembentukan statut, bahawa kewajipan statutori dikenakan untuk perlindungan kelas terhad orang awam dan bahawa Parlimen berniat untuk memberikan orang awam tersebut hak tindakan persendirian untuk pelanggaran kewajipan itu. Seksyen 4 Akta Keretapi 1991 tidak memberikan apa-apa hak tindakan persendirian sebegini kepada orang awam yang tercedera oleh suatu pelanggaran. Atas alasan ini sahaja, tindakan terhadap defendan keempat patut ditolak. Lagipun, tidak terdapat pelanggaran kewajipan statutori (lihat perenggan 35–36).]

Notes

For a case on breach of statutory duty, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1783.

For cases on res ipsa loquitor, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1224–1257.

Cases referred to

Barkway v South Wales Transport Co Ltd [1950] 1 All ER 392, HL (folld)
Beulah Larson v St Francis Hotel 83 Cal App 2d 210 (not folld)
Lloyde v West Midlands Gas Board [1971] 2 All ER 1240, CA (folld)
MA Clyde v Wong Au Mei [1970] 2 MLJ 183, FC (folld)
Moore v R Fox & Sons [1956] 1 QB 596, CA (refd)
Scott v London and St Katherine Docks Co (1865) 3 H & C 596 (folld)
Teoh Guat Looi v Ng Hong Guan [1998] 4 MLJ 525, CA (refd)

A *X (minors) v Bedfordshire County Council* [1955] 3 All ER 353, HL (refd)

Legislation referred to
Railways Act 1991 ss 2, 4, 7(2)

B *Steven Thiru (Brian Jit Singh with him) (Shook Lin & Bok) for the plaintiff.*
T Tharumarajah (Ananth Shanmugam with him) (Azim, Tunku Farik & Wong) for the first and second defendants.
Lailawati bt Ali (Senior Federal Counsel, Attorney General's Chambers) for the fourth defendant.

C **Harmindar Singh JC:**

[1] What are the odds of a wheel falling from the sky and hitting you? Some might say a million to one. However, these odds mean nothing to the D plaintiff in this case. On 16 August 2002, he was on his way to an assignment in Shangri-la Hotel at Jalan Sultan Ismail, Kuala Lumpur. He was and still is a senior reporter with Bernama news agency. At about 2.50pm on that day, he was standing at the road divider and waiting to cross the road to the E Shangri-la Hotel. He was directly below the elevated KL Monorail track. At that precise moment, a KL Monorail train which was on a test run passed overhead. As it passed, a safety wheel weighing 13.4kg from the train came off and fell on the plaintiff. He suffered serious head and bodily injuries as a result. He was 40 years old at the time. He is now alleging negligence on the F part of the defendants. He is claiming for general and special damages.

WHO ARE THE DEFENDANTS?

[2] The first defendant is the designer and manufacturer of the KL G Monorail train which is used in the KL Monorail Project. They were responsible for the maintenance and safe use of the trains including for the purpose of testing and commissioning of the train. Pursuant to a turnkey supply contract with the Government of Malaysia, the first defendant assumed liability for the design and manufacture for 12 monorail train set of H two-car vehicles and all related equipment for the KL Monorail Project. It was one of these trains that was utilised for the test run on 16 August 2002.

[3] The second defendant is responsible for the installation, commission and operation of the KL Monorail train. Pursuant to s 7(2) of the Railways I Act 1991 (the Act), the second defendant submitted a railway scheme on 18 August 2002. This was eventually approved on 29 August 2003. By a concession agreement dated 15 December 2002 with the Government of Malaysia, the second defendant was to undertake the operation and maintenance of the KL Monorail System for the KL Monorail Project.

[4] The third defendant purported to operate and maintain the KL Monorail system through its wholly owned subsidiaries, that is, the first and second defendants. However, by an application, the suit against the third defendant was struck out prior to the trial.

[5] The fourth defendant is the public officer named under the Act 463. He is the approving and certifying authority under the Ministry of Transport of any railway scheme in Malaysia. He is charged with the statutory function of regulating railway operations and prescribing minimum safety standards for railway operations.

WHAT IS THIS KL MONORAIL SYSTEM?

[6] The KL Monorail Project covers an area of 8.6km long and runs on elevated tracks from Jalan Tun Razak at the north end to the KL Sentral terminal at the south end and passes through the central business district of Kuala Lumpur. Some of the elevated tracks are built above dividers along the said route supported by pylons. One of the elevated tracks is built above the road divider where the incident of 16 August 2002 took place.

[7] The KL Monorail train is based on the ALWEG model monorail system and it involves the train straddling along a narrow guideway beam with the side tyres hugging the sides of the beam. The side tyres consist of a guide wheel and a safety wheel. The side tyres are exposed and visible from below.

[8] The KL Monorail train consists of two end cars permanently coupled together to form a two-car train set. There are four bogies in a two-car train set and six guide wheels per bogie, making a total of twenty-four in a two-car train set. Each guide wheel is provided with a safety wheel as a back-up in the event of a tyre puncture. Each safety wheel is secured to the hub of the guide wheel by six fastening bolts. Each guide wheel and safety wheel is held up by an axle.

[9] The evidence in this case revealed that the train involved in the 16 August 2002 incident was the first monorail manufactured by the first and second defendants. It was also on a test run at the time pending commissioning and licensing by the fourth defendant. This monorail train had side tyres fixed to it and included safety wheels which were facing downwards with rims and weighed about 13.4kg. It was the left safety wheel of the lower guide wheel of the monorail train that fell and hit the plaintiff. The distance between the elevated track that the monorail was travelling and the ground where the plaintiff was standing was about 10m.

A WHAT CAUSED THIS SAFETY WHEEL TO COME OFF?

[10] This is the pivotal question as the primary issue in this case is whether the incident was caused by the want of care or negligence of the defendants in the operation of the train as it was passing above the plaintiff at the relevant time. The plaintiff is alleging that there was a design defect and that the test run of the train was undertaken without ensuring that the train was ready and safe to be used over a public pathway and pedestrian area. He is also claiming that there was a breach of the statutory duties by the fourth defendant.

[11] As is usually the case, investigations were carried out by different agencies to determine what caused the wheel to fall off. The earliest report was prepared by the first and second defendants. This report was called the Independent Investigation Task Force Report (IITFR). It concluded as follows:

> Having audited the design, assembly process and maintenance issues surrounding the Safety-Wheel, as well as examining all the evidence available and conducting tests at Rawang, the Task Force can find no possibility for the design, assembly or maintenance to reasonably contribute to the dislodgement of the Safety Wheel on 16 August 2002. There is one other possibility, that a person or persons unknown tampered with the Safety Wheel

[12] Significantly, there was also a recommendation in the Report for additional safety and to prevent a reoccurrence of this incident. 'It was to wire together in three pairs, the six 20mm M.6 bolts which secure the safety wheel to the guidance wheel hub. This would effectively prevent any possibility of the fastening bolts from unscrewing.'

[13] The police also conducted investigations. They sent the safety wheel concerned (exh P1) to the chemist ('SP1'). The chemist's findings were as follows:

> The 6 bolts used to fasten the safety wheel 'A4' to the hub of the guide wheel 'A01' were supporting a heavy load of 13.2 kilograms (the weight of the safety wheel). Further, the whole system was subjected to vibration caused by the movement of the monorail. Under these external conditions of the downward load and vibration, the bolts, which could have not have been tightened properly could have unscrewed slowly and eventually were detached from the hub causing the safety wheel to fall ...
>
> Further, I am also of the opinion that the possibility of the bolts to have been loosened (or detached) deliberately or otherwise and subsequently caused the above event cannot be ruled out.

[14] Next was a report which reviewed the IITFR. This was prepared by the Independent Checking Engineers (ICE) for the KL Monorail Project, MM Consultants Sdn Bhd. ICE were primarily responsible for supervising the project by virtue of the concession agreement.

[15] One of the criticisms was that there was 'no completed checklist for the day of the incident although assurances are given by the general operations manager that the driver conducted the appropriate level of visual check'. On another issue, it was stated that the report 'should also clarify the security arrangements during the transportation process, including any possible public access to the bogies between them leaving the Rawang facility and arranging in the city'.

[16] Finally, there was the investigation and report prepared by the Jawatankuasa Siasatan Antara Agensi (Inter Agency Report (IAR)) which was set up on 28 August 2002 to investigate this incident. The committee concluded that there was no evidence of any weakness in the design. They also concluded that 'punca sebenar bagaimana dan mengapa keenam-enam bolt pada roda keselamatan tertanggal tidak dapat dikenal pasti'. They however did not discount the possibility of tampering as a possible cause of the wheel falling off.

[17] Significantly, they made the following recommendations:

> Kawalan keselamatan hendaklah diperketatkan di kawasan-kawasan penyimpanan atau penghentian tren untuk masa yang lama seperti di kawasan depot, bengkel serta kawasan berkaitan untuk mengelakkan akses kepada tren oleh pihak yang tiada kebenaran atau tiada urusan.
>
> Kaedah pemasangan roda keselamatan kepada hab serta peralatan-peralatan lain bawah tren hendaklah dikaji semula untuk mengadakan ciri pasti selamat agar tidak berlaku kejatuhan apa-apa alat daripada tren walaupun berlaku kegagalan pengikatan.
>
> Prosedur pemeriksaan tren sebelum menjalani setiap ujian di landasan Kuala Lumpur hendaklah dikaji semula bagi memastikan tren benar-benar selamat untuk digunakan dengan mengadakan prosedur kerja bertulis. Setiap kerja pemeriksaan yang dijalankan hendaklah disahkan oleh pegawai berkenaan.
>
> Prosedur pembuatan yang lebih mantap dan lengkap hendaklah diwujudkan yang perlu mengambilkira semua kehendak yang dinyatakan dalam reka bentuk. Pemeriksaan kerja yang dijalankan oleh kontraktor kepada pengeluar hendaklah diperincikan serta disahkan oleh kakitangan yang sesuai oleh kedua-dua pihak kontraktor dan pengeluar yang menerima hasil kerja kontraktor berkenaan sebelum kerja diluluskan untuk diterima.

A Pengurusan pengesahan reka bentuk yang lebih teratur hendaklah diadakan disertai dengan pengwujudan sistem rekod yang lebih mantap dan lengkap.

[18] It would appear from all these investigations and the reports prepared that the six fastening bolts had not sheared. This only left the possibility that the bolts could have been unscrewed gradually and were eventually detached from the hub causing the safety wheel to fall off. What caused the bolts to become unscrewed? Logically, this could only have happened if the bolts were not tightened properly by the persons in charge or if they were tampered by someone. This tampering again could have been caused by someone out to cause mischief or someone with more sinister motives. At this juncture, an important question arises which is as follows.

WAS THERE PRIMA FACIE EVIDENCE OF NEGLIGENCE?

[19] In any action for negligence, the burden is on the plaintiff to prove certain specific acts or omissions on the part of the defendant to show some negligent conduct. Sometimes a prima facie inference of negligence may be drawn from the circumstances of the case by recourse to the maxim known as *res ipsa loquitur*. Loosely translated, this colourful Latin phrase means 'the event speaks for itself'. It is essentially a rule of evidence premised on common sense, fair play and justice.

[20] This rule probably emanates from the case of *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 where the plaintiff, a customs officer, was injured by some sugar bags falling on him in the defendant's warehouse. The principle was enunciated by Erie CJ as follows (at p 667):

> There must be some reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

[21] In *Lloyde v West Midlands Gas Board* [1971] 2 All ER 1240, Megaw LJ described the rule as a common sense approach to the effect of the evidence in certain circumstances and put it as follows (at p 1246):

> It means that a plaintiff prima facie establishes negligence where:
>
> (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident, but
>
> (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission

of the defendant or of someone for whom the defendant was responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.

[22] In *Barkway v South Wales Transport* [1950] 1 All ER 392, Lord Radcliffe explained that the essence of the rule is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence.

[23] The rationale for this rule was explained by the Federal Court in *MA Clyde v Wong Au Mei* [1970] 2 MLJ 183 as follows (at p 188):

> The fundamental basis of the maxim is that the rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it, may cause hardship to the plaintiff if it is impossible for him to know what precise acts of omission led to this damage, and this is most obviously so where the cause of the damage is peculiarly within the means of knowledge of the defendant who caused it.

[24] Applying the principles to the present case, it would be safe to assert that a safety wheel of a monorail train does not, in the ordinary course of things, fall off and hit persons on the ground below. It will also be fair to say that the safety wheel on the train was under the sole control of the first and second defendants or their servants. For this reason, the defendants' reliance on the American case of *Beulah Larson v St Francis Hotel* 83 Cal App 2d 210 is, with respect, misplaced. In that case, the plaintiff had failed to prove that the defendant had exclusive control of the falling armchair outside the defendant hotel. Finally, in the present case, although the plaintiff could point to the safety wheel coming off the monorail train, he is unable to state precisely why the wheel had come off. It was therefore clear to me that the plaintiff had made out a prima facie case of negligence on the part of the first and second defendants. It was therefore incumbent on the part of the first and second defendants to provide credible evidence to show that the incident occurred without negligence.

HAVE THE FIRST AND SECOND DEFENDANTS REBUTTED THE INFERENCE OF NEGLIGENCE?

[25] An inference of negligence can be rebutted by introducing evidence. Although the burden of proof remains throughout on the plaintiff, where a prima facie case of negligence has been made out, the defendant bears the burden of introducing evidence to explain and show how the incident occurred without negligence on his or her part. Failure to do so will establish liability on the part of the defendants (*Teoh Guat Looi v Ng Hong Guan* [1998] 4 MLJ 525; *MA Clyde v Wong Ah Mei & Anor*).

[26] In this regard, it was held in *Moore v R Fox & Sons* [1956] 1 QB 596 that the onus of proof is not discharged by merely showing that the accident was inexplicable. It was not sufficient to show several hypothetical causes consistent with the absence of negligence and that the accident might have occurred without negligence on their part. To discharge the onus they had to go further and either show that they had not been negligent, or give an explanation of the cause of the accident which did not connote negligence by them.

[27] In the present case, the first and second defendants had failed to provide a reasonable explanation as to how the safety wheel had come off the train. They only alluded to a possibility that there had been tampering by unknown persons. However, no evidence of tampering was disclosed save for references to the various investigation reports. It therefore remained a hypothesis but significantly, it could not have been the only possible cause. It might also have been the case that the bolts were not sufficiently tightened by the employees of the defendants. It should be noted that no 'checklist' as alluded to by the ICE was produced indicating probably that there was none. This was after it was disclosed by the documentary evidence that the last internal check on the safety wheel was on 25 July 2002, some three weeks prior to the incident. This was after the safety wheel was removed and refitted on 23 July 2002. This begs the question of why was the wheel removed and whether the integrity of the wheel was affected by this exercise. In my view, the first and second defendants have fallen far short of discharging the onus.

[28] In any event, if there was tampering, the question that arises is when or where could it have happened. If it occurred at the place where the trains are stored, no evidence was introduced to show that the first and second defendants took all requisite safety measures to prevent such tampering. In particular, there was no evidence as to the number of security personnel employed and no evidence as to the security arrangements, for example, close circuit cameras. In short, the first and second defendants ought to have led evidence that they took all proper steps to avoid this danger of tampering. I think the failure to do so was fatal. It was therefore of little use arguing that the tampering was an intervening act by a third party to escape liability. The basis upon which this submission is relied upon is absent. Suffice to say that this submission of an intervening act is without merit.

[29] It was also pertinent to note that the safety wheel was exposed in the sense that it could be seen and that there was nothing to prevent it from falling to the ground if the bolts failed to secure the wheel. Any reasonable person observing the monorail train would be left wondering if the wheel was secure or if it could or would come off. In other words, the possibility of the wheel coming off was not unforeseeable. The first and second made a

recommendation in the Report 13 (IITFR) to wire together in three pairs, the six 20mm M.6 bolts to secure the safety wheel to the guidance wheel hub as an additional safety measure to prevent a reoccurrence. Although it is easy to be wise after the event, this measure alone would surely have saved the plaintiff from the considerable pain that he had to endure and still endures.

[30] For all these reasons, I am satisfied that negligence has been proven on the part of the first and second defendants. They are therefore liable to the plaintiff equally for damages and costs. As was directed during case management, the damages will be assessed by the senior assistant registrar.

WAS THE FOURTH DEFENDANT IN BREACH OF HIS STATUTORY DUTIES?

[31] It is not disputed that both the first and second defendants were within the definition of 'railway company' vide s 2 of the Act. They would therefore come under the jurisdiction of the fourth defendant who is the authority appointed by the Minister for the purpose of carrying out the duties and functions assigned to him under the Act. The duties and functions of the fourth defendant, as stated in s 4 of the Act, amongst others, was to regulate railway operations and railway services and to prescribe the minimum safety standards for railway operations.

[32] As such, it would appear that the fourth defendant was responsible to perform its statutory duties with regards to the monorail trains even though there was no license yet and the train was only on a test run when the incident occurred. Railway operations would include test runs prior to a license being issued.

[33] Questions were also raised as to whether the first and second defendants had complied with a duty to submit a railway scheme pursuant to s 7(2) of the Act. There was however more than sufficient evidence to show that this was indeed the case.

[34] In summary, the plaintiff alleged breach of their statutory duty in failing to have continuous supervision of the first and second defendant's operations, unlawfully delegating their functions to the independent consultants (ICE), failure to provide notice to the public that the monorail trains would be on a test run and failing to cordon off the divider under the elevated monorail tracks during the test run. It was also submitted that the fourth defendant was negligent in the manner he carried out the duties or failed to carry out his duties under the Act.

[35] In essence, however, the plaintiff is arguing that the fourth defendant had breached the statutory duty as set out in s 4 of the Act. With regards to actions for breach of statutory duty simpliciter, it was held by the House of Lords in *X (minors) v Bedfordshire County Council* [1955] 3 All ER 353 that the breach of statutory duty in such a case was not by itself sufficient to give rise to any private law cause of action. A private law cause of action only arose if it could be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.

[36] Considered in this light, it seems to me that s 4 of the Act in no way confers any such right of private action by a member of the public injured by a breach. I think s 4 is more in the nature of general provisions outlining the administrative and regulatory functions of the fourth defendant. On this ground alone, the action against the fourth defendant should be dismissed.

[37] In any event, it appeared to me that the minimum safety standards for the operation of the monorail was incorporated in the Railway Scheme dated 17 May 2002. There was a whole chapter entitled 'Safety Aspects' in the scheme itself where detailed provisions regarding safety were set out. There was also evidence from SD1 that throughout the construction period before the license was granted by the Minister to start its operation, the officers of the fourth defendant conducted regular inspections on the whole project. Also, the concession agreement dated 15 December 2000 between the Government of Malaysia and the second defendant provided for the appointment of an Independent Checking Engineer (ICE) whose role was to provide information and reports to the fourth defendant if so requested. My impression was that the fourth defendant had taken his duties and functions under the Act quite seriously. I fail to see how there was a breach of statutory duty.

[38] As for the issue of notices or the construction of fences to cordon off the area under the elevated tracks, these are matters within the discretion of the fourth defendant. The court should be slow in substituting its own judgment for that of the fourth defendant. In any event, there are penalties provided in the Act if a railway company fails to comply with the directions of the fourth defendant in these matters. As such and for the reasons I had adverted to earlier, I do not think that any private law cause of action can

arise in such a case. For these reasons, the plaintiff's claim against the fourth defendant must fail. Accordingly, the plaintiff's claim against the fourth defendant is dismissed with costs.

Plaintiff's claim against fourth defendant dismissed with costs.

Reported by Kanesh Sundrum